

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ERIK GARCIA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
vs.	)	
	)	FILE No.
C.B.S. INVESTMENTS INC.,	)	
	)	
Defendant.	)	

**COMPLAINT**

COMES NOW, ERIK GARCIA, by and through the undersigned counsel, and files this, his Complaint against Defendant, C.B.S. INVESTMENTS INC., pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* (“ADA”) and the ADA’s Accessibility Guidelines, 28 C.F.R. Part 36 (“ADAAG”). In support thereof, Plaintiff respectfully shows this Court as follows:

**JURISDICTION**

1. This Court has original jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1343 for Plaintiff’s claims pursuant to 42 U.S.C. § 12181 *et seq.*, based upon Defendant’s failure to remove physical barriers to access and violations of Title III of the ADA.

**PARTIES**

2. Plaintiff ERIK GARCIA (hereinafter “Plaintiff”) is, and has been at all times relevant to the instant matter, a natural person residing in Houston, Texas (Harris County).

3. Plaintiff is disabled as defined by the ADA.

4. Plaintiff is required to traverse in a wheelchair and is substantially limited in performing one or more major life activities, including but not limited to: walking, standing,

grabbing, grasping and/or pinching.

5. Plaintiff uses a wheelchair for mobility purposes.

6. Plaintiff is also an independent advocate of the rights of similarly situated disabled persons and is a “tester” for the purpose of enforcing Plaintiff’s civil rights, monitoring, determining and ensuring whether places of public accommodation are in compliance with the ADA. His motivation to return to a location, in part, stems from a desire to utilize ADA litigation to make Plaintiff’s community more accessible for Plaintiff and others; and pledges to do whatever is necessary to create the requisite standing to confer jurisdiction upon this Court so an injunction can be issued correcting the numerous ADA violations on this property, including returning to the Property as soon as it is accessible (“Advocacy Purposes”).

7. Defendant, C.B.S. INVESTMENTS INC. (hereinafter “C.B.S. INVESTMENTS INC.”), is a Texas company that transacts business in the State of Texas and within this judicial district.

8. Defendant, C.B.S. INVESTMENTS INC., may be properly served with process via its registered agent for service, to wit: Johnny K. To, Registered Agent, 37 Watermill Place, Sugar Land, TX 77479.

### **FACTUAL ALLEGATIONS**

9. On or about February 2, 2019, September 2, 2019, May 11, 2020 and again on July 5, 2020, Plaintiff was a customer at “Dairy Queen” a business located at 831 W. Main Street, League City, TX 77573, referenced herein as “Dairy Queen”. Attached is a receipt and selfie documenting Plaintiff’s purchase on February 2, 2019. *See* Exhibit 1. Attached is a receipt and selfie documenting Plaintiff’s purchase on September 2, 2019. *See* Exhibit 2. Attached is a selfie documenting Plaintiff’s visit on May 11, 2020. *See* Exhibit 3. Finally,

attached is a receipt and selfie documenting Plaintiff's purchase on July 5, 2020. *See* Exhibit 4.

10. Dairy Queen is located on the Property owned by Defendant, C.B.S. INVESTMENTS INC.

11. C.B.S. INVESTMENTS INC. is the owner or co-owner of the real property and improvements that Dairy Queen is situated upon and that is the subject of this action, referenced herein as the "Property."

12. Plaintiff lives 6 miles from Dairy Queen and the Property.

13. **PRESUIT NOTICE:** On November 24, 2020, Plaintiff mailed via certified mail/return receipt requested, a pre-suit notice of the violations and his intent to file this lawsuit if a settlement could not be reached to resolve the claim prior to filing this Complaint. The presuit notice was delivered on November 28, 2020 to 37 Watermill Place, Sugar Land, TX 77479, the address of Johnny K. To, Registered Agent for Defendant. The presuit notice provided a deadline of December 14, 2020 to contact Plaintiff's counsel to avoid the filing of a lawsuit. As of December 15, 2020, Defendant failed to contact Plaintiff's counsel to resolve this case.

14. No response was forthcoming from Defendant after the presuit notice was delivered.

15. Plaintiff's access to the business(es) located at 831 W. Main Street, League City, TX 77573, Harris County Property Appraiser's ID number R136278 ("the Property"), and/or full and equal enjoyment of the goods, services, foods, drinks, facilities, privileges, advantages and/or accommodations offered therein were denied and/or limited because of his disabilities, and he will be denied and/or limited in the future unless and until Defendant, C.B.S. INVESTMENTS INC., is compelled to remove the physical barriers to access and correct the

ADA violations that exist at the Property, including those set forth in this Complaint.

16. Defendant, C.B.S. INVESTMENTS INC., as property owner, is responsible for complying with the ADA for both the exterior portions and interior portions of the Property. Even if there is a lease between Defendant, C.B.S. INVESTMENTS INC. and the tenant allocating responsibilities for ADA compliance within the unit the tenant operates, that lease is only between the property owner and the tenant and does not abrogate the Defendant's independent requirement to comply with the ADA for the entire Property it owns, including the interior portions of the Property which are public accommodations. *See* 28 CFR § 36.201(b).

17. Plaintiff has visited the Property at least seven times before as a customer and advocate for the disabled (four times Plaintiff documented the visit). Plaintiff intends on revisiting the Property within six months or sooner, as soon as the barriers to access detailed in this Complaint are removed and the Property is accessible again. The purpose of the revisit is to be a regular customer, to determine if and when the Property is made accessible and to maintain standing for this lawsuit for Advocacy Purposes.

18. Plaintiff intends on revisiting the Property to purchase goods and/or services as a regular customer living in the near vicinity as well as for Advocacy Purposes, but does not intend to re-expose himself to the ongoing barriers to access and engage in a futile gesture of visiting the public accommodation known to Plaintiff to have numerous and continuing barriers to access.

19. Plaintiff travelled to the Property as a customer and as an independent advocate for the disabled, encountered the barriers to access at the Property that are detailed in this Complaint, engaged those barriers, suffered legal harm and legal injury, and will continue to suffer such harm and injury as a result of the illegal barriers to access present at the Property.

**COUNT I**  
**VIOLATIONS OF THE ADA AND ADAAG**

20. On July 26, 1990, Congress enacted the Americans with Disabilities Act 42 U.S.C. § 12101 *et seq.*

21. Congress found, among other things, that:

- (i) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
- (ii) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- (iii) discrimination against individuals with disabilities persists in such critical areas as employment, housing public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- (iv) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser service, programs, activities, benefits, jobs, or other opportunities; and
- (v) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

42 U.S.C. § 12101(a)(1) - (3), (5) and (9).

22. Congress explicitly stated that the purpose of the ADA was to:

- (i) provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (ii) provide a clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; and

\* \* \* \* \*

- (iv) invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(1)(2) and (4).

23. The congressional legislation provided places of public accommodation one and a half years from the enactment of the ADA to implement its requirements.

24. The effective date of Title III of the ADA was January 26, 1992 (or January 26, 1993 if a defendant has 10 or fewer employees and gross receipts of \$500,000 or less). 42 U.S.C. § 12181; 28 C.F.R. § 36.508(a).

25. The Property is a public accommodation and service establishment.

26. Pursuant to the mandates of 42 U.S.C. § 12134(a), on July 26, 1991, the Department of Justice and Office of Attorney General promulgated federal regulations to implement the requirements of the ADA. 28 C.F.R. Part 36.

27. Public accommodations were required to conform to these regulations by January 26, 1992 (or by January 26, 1993 if a defendant has 10 or fewer employees and gross receipts of \$500,000 or less). 42 U.S.C. § 12181 *et seq.*; 28 C.F.R. § 36.508(a).

28. The Property must be, but is not, in compliance with the ADA and ADAAG.

29. Plaintiff has attempted to, and has to the extent possible, accessed the Property in his capacity as a customer of the Property as well as an independent advocate for the disabled, but could not fully do so because of his disabilities resulting from the physical barriers to access, dangerous conditions and ADA violations that exist at the Property that preclude and/or limit his access to the Property and/or the goods, services, facilities, privileges, advantages and/or

accommodations offered therein, including those barriers, conditions and ADA violations more specifically set forth in this Complaint.

30. Plaintiff intends to visit the Property again in the very near future as a customer and as an independent advocate for the disabled, in order to utilize all of the goods, services, facilities, privileges, advantages and/or accommodations commonly offered at the Property, but will be unable to fully do so because of his disability and the physical barriers to access, dangerous conditions and ADA violations that exist at the Property that preclude and/or limit his access to the Property and/or the goods, services, facilities, privileges, advantages and/or accommodations offered therein, including those barriers, conditions and ADA violations more specifically set forth in this Complaint.

31. Defendant, C.B.S. INVESTMENTS INC., has discriminated against Plaintiff (and others with disabilities) by denying his access to, and full and equal enjoyment of the goods, services, facilities, privileges, advantages and/or accommodations of the Property, as prohibited by, and by failing to remove architectural barriers as required by, 42 U.S.C. § 12182(b)(2)(A)(iv).

32. Defendant, C.B.S. INVESTMENTS INC., will continue to discriminate against Plaintiff and others with disabilities unless and until Defendant, C.B.S. INVESTMENTS INC., is compelled to remove all physical barriers that exist at the Property, including those specifically set forth herein, and make the Property accessible to and usable by Plaintiff and other persons with disabilities.

33. A specific list of unlawful physical barriers, dangerous conditions and ADA violations which Plaintiff experienced and/or observed, or was made aware of prior to the filing of this Complaint, that precluded and/or limited Plaintiff's access to the Property and the full and

equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the Property include, but are not limited to:

**ACCESSIBLE ELEMENTS:**

- (i) The total number of accessible parking spaces is inadequate and is in violation of Section 208.2 of the 2010 ADAAG standards. There are 26 total parking spaces at the Property requiring two accessible parking spaces, but there is only one accessible parking space. This violation made it difficult for Plaintiff to locate an accessible parking space.
- (ii) There are vertical rises in the accessible parking space with heights in excess of ¼ inch in violation of section 502.4 of the 2010 ADAAG Standards. This violation would make it difficult and dangerous to enter and exit his vehicle while parked at this spot.
- (iii) There are two marked access aisles for the accessible parking space, however, there is no access route leading from the access aisle directly north of the accessible parking space due to the lack of 36 inches of clear width due to the configuration of the accessible parking space and the adjacent parking space, this is a violation of section 502.7 of the 2010 ADAAG Standards.
- (iv) The Property has a ramp leading from the accessible parking space to the accessible entrances with a slope exceeding 1:10 in violation of Section 405.2 and a cross-slope of greater than 1:48 in violation of Section 405.3 of the 2010 ADAAG standards. This violation made it dangerous and difficult for Plaintiff to access the units of the Property.



- (v) The accessible curb ramp nearest the accessible parking space lacks a level landing in violation of section 406.4 of the 2010 ADAAG Standards. This violation would make it dangerous and daunting for Plaintiff to attempt to access the unit from the accessible parking space.
- (vi) Due to the violations detailed in paragraphs 31 (iii), (iv) and (v), there is no access route leading from the accessible parking space, as such the accessible parking space is in violation of section 208.3.1 of the 2010 ADAAG Standards.
- (vii) Due to the presence of a gate which has been open many times in the past, in the path of the accessible route directly after the accessible ramp, there are publicly accessible areas of the Property having accessible routes with clear widths below the minimum 36 inch requirement as required by Section 403.5.1 of the 2010 ADAAG standards. This violation made it dangerous and difficult for Plaintiff to access exterior public features of the Property.
- (viii) The accessible doorway threshold has a vertical rise in excess of ½” in violation of Section 404.2.5 of the 2010 ADAAG standards. This violation made it dangerous and difficult for Plaintiff to access the Dairy Queen.
- (ix) The doorway of the accessible entrance is not level, due to the proximity of the sidewalk drop-off to the accessible entrance, in violation of Section 404.2.4.4 of the 2010 ADAAG standards. This violation made it difficult for Plaintiff to access the units of the Property.
- (x) The doorway leading to the restroom area of the Dairy Queen is not 32 inches minimum in violation of Section 404.2.3 of the 2010 ADAAG standards. This

violation made it difficult and dangerous for Plaintiff to access the interior features of the Dairy Queen.

## **RESTROOMS**

- (i) The door to the restrooms has a minimum clear width below 32 inches in violation of Section 404.2.3 of the 2010 ADAAG standards. This made it difficult for Plaintiff to safely utilize the restroom facilities.
- (ii) The restroom doors lack signage in compliance with Sections 216.8 and 703 of the 2010 ADAAG standards. This made it difficult for Plaintiff to locate accessible restroom facilities.
- (iii) The restrooms have door hardware requiring twisting of the wrist in violation of Section 404.2.7 of the 2010 ADAAG standards. This made it difficult for Plaintiff to utilize the restroom facilities.
- (iv) The restroom has walking surfaces lacking a 36 inch clear width in violation of Section 403.5.1 of the 2010 ADAAG standards. This violation made it difficult for Plaintiff to properly utilize the restroom facilities at the Dairy Queen.
- (v) There is inadequate clear turning space (less than 60 inches) in violation of Section 603.2.1 of the 2010 ADAAG standards. This made it difficult for Plaintiff to safely utilize the restroom facilities.
- (vi) The maximum height of the urinal exceeds 17 inches and is in violation of Section 605.2 of the 2010 ADAAG standards. This made it difficult for a disabled individual to safely utilize the restroom facilities.

- (vii) The controls on the faucets require pinching and turning of the wrists in violation of Section 309.4 of the 2010 ADAAG standards. This made it difficult for Plaintiff to utilize the restroom facilities.
- (viii) Restrooms have a vanity with inadequate knee and toe clearance in violation of Section 306 of the 2010 ADAAG standards. This made it difficult for Plaintiff to safely utilize the restroom facilities.
- (ix) The height of the bottom edge of the reflective surface of the mirror in the bathrooms exceeds 40 inches in violation of Section 603.3 of the 2010 ADAAG standards. This violation made it difficult for the Plaintiff to properly utilize public features of the restroom.
- (x) The grab bars/handrails adjacent to the commode are missing and therefore violate Section 604.5 of the 2010 ADAAG standards. This made it difficult for Plaintiff to safely utilize the restroom facilities.
- (xi) Restrooms in the Dairy Queen have fixtures with inadequate clear floor space in violation of Sections 606.2, 603.2 and 604.3 of the 2010 ADAAG standards. This made it difficult for Plaintiff to safely utilize the restroom facilities.

34. The violations enumerated above may not be a complete list of the barriers, conditions or violations encountered by Plaintiff and/or which exist at the Property.

35. Plaintiff requires an inspection of the Property in order to determine all of the discriminatory conditions present at the Property in violation of the ADA.

36. The removal of the physical barriers, dangerous conditions and ADA violations alleged herein is readily achievable and can be accomplished and carried out without significant difficulty or expense. 42 U.S.C. § 12182(b)(2)(A)(iv); 42 U.S.C. § 12181(9); 28 C.F.R. § 36.304.

37. All of the violations alleged herein are readily achievable to modify to the Property into compliance with the ADA.

38. Upon information and good faith belief, the removal of the physical barriers and dangerous conditions present at the Property is readily achievable because the nature and cost of the modifications are relatively low.

39. The removal of the physical barriers and dangerous conditions present at the Property is also readily achievable because Defendant has available to it a \$5,000.00 tax credit and up to a \$15,000.00 tax deduction from the IRS for spending money on accessibility modifications.

40. Upon information and good faith belief, the Property has been altered since 2010.

41. In instances where the 2010 ADAAG standards do not apply, the 1991 ADAAG standards apply, and all of the alleged violations set forth herein can be modified to comply with the 1991 ADAAG standards.

42. Plaintiff is without adequate remedy at law, is suffering irreparable harm, and reasonably anticipates that he will continue to suffer irreparable harm unless and until Defendant, C.B.S. INVESTMENTS INC., is required to remove the physical barriers, dangerous conditions and ADA violations that exist at the Property, including those alleged herein.

43. Plaintiff's requested relief serves the public interest.

44. The benefit to Plaintiff and the public of the relief outweighs any resulting detriment to Defendant, C.B.S. INVESTMENTS INC.

45. Plaintiff's counsel is entitled to recover its reasonable attorney's fees and costs of litigation from Defendant, C.B.S. INVESTMENTS INC., pursuant to 42 U.S.C. §§ 12188 and 12205.

46. Pursuant to 42 U.S.C. § 12188(a), this Court is provided authority to grant injunctive relief to Plaintiff, including the issuance of an Order directing Defendant, C.B.S. INVESTMENTS INC., to modify the Property to the extent required by the ADA.

WHEREFORE, Plaintiff prays as follows:

- (a) That the Court find Defendant, C.B.S. INVESTMENTS INC., in violation of the ADA and ADAAG;
- (b) That the Court issue a permanent injunction enjoining Defendant, C.B.S. INVESTMENTS INC., from continuing their discriminatory practices;
- (c) That the Court issue an Order requiring Defendant, C.B.S. INVESTMENTS INC., to (i) remove the physical barriers to access and (ii) alter the subject the Property to make it readily accessible to and useable by individuals with disabilities to the extent required by the ADA;
- (d) That the Court award Plaintiff his reasonable attorneys' fees, litigation expenses and costs; and
- (e) That the Court grant such further relief as deemed just and equitable in light of the circumstances.

Dated: December 15, 2020.

Respectfully submitted,

/s/ Douglas S. Schapiro  
Douglas S. Schapiro, Esq.  
*Attorney-in-Charge for Plaintiff*  
Southern District of Texas ID No. 3182479  
The Schapiro Law Group, P.L  
7301-A W. Palmetto Park Rd., #100A  
Boca Raton, FL 33433  
Tel: (561) 807-7388  
Email: schapiro@schapirolawgroup.com